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**Supreme Court of the United States**

**October Term, 1943**

**No. 378**

THE GLEMBY Co. INC. and NEW YORK  
MERCHANDISE Co. INC.,

*Petitioners,*

*against*

MONOGRAM MANUFACTURING Co.,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND JUDICIAL CIRCUIT, AND  
SUPPORTING BRIEF.**

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT, AND SUPPORTING BRIEF.

*To the Honorable the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

### Summary Statement of Matters Involved.

Petitioners are charged with infringement of Claims 11, 12, 13 and 15 of Visitacion Reissue Patent No. 21,117 (R. 198). Respondent has conceded that petitioners did not infringe upon the seven claims of the original Visitacion Patent No. 2,132,500 (R. 199). The seven claims of the original patent are duplicated as Nos. 1-7 of the reissue patent. Respondent had the right to charge infringement of these duplicates of the original claims, under 35 U. S. C. A. 64. This respondent did not do. The opinion of the

District Court (R. 225) is reported in 47 Fed. Supp. 732. The appellate opinion (R. 250) is not officially reported.

The issues are of law. However, a brief statement of the device in issue is necessary, in order to state the legal issues.

Respondent's commercial device was made exactly according to the Wallace & Leisy Patent No. 2,156,073 (R. 200), which was invalidated by the Circuit Court of Appeals.

Fig. 1 of said Wallace & Leisy patent shows a comb which has a molded handle made of resilient rubber or the like, which is molded with two tubular arms of unequal length. Prior to curling the hair, one leg of a hairpin is mounted in a groove of the long arm of the handle. After the hair is spirally curled around the two arms of the handle, said curl is slipped longitudinally off said two arms, together with the hairpin, so that the hairpin remains upon the spirally-wound curl, and the hairpin thus prevents the curl from unwinding.

A picture of the accused article, which was sold by each petitioner, is annexed on page 18. This accused article is so similar to the Wallace & Leisy article, as to require no additional explanation.

The drawings and description of the original Visitacion patent (R. 199) and of the reissued patent (R. 198), are identical. No article was ever put on the market according to the Visitacion patent. Fig. 1 shows a rigid metal tube, which is longitudinally slitted, to provide two arms of unequal length. Fig. 1 also shows a spring 27, located diagonally in the slit between said arms, in order to clamp the end of the hair in said slit. Fig. 4 shows a hairpin which is mounted on the long arm, and it also shows the spirally-wound lock of hair. The other embodiments are essentially the same, in showing the diagonal spring, namely, the spring 32 of Fig. 6, and the spring 46 of Figs. 11 and 13.

The petitioners are wholly independent concerns. Each petitioner went on the market in March, 1939 (R. 46, 50). This was after the original limited Visitacion patent had issued on Oct. 11, 1938, and also after the application for reissue had been filed on Jan. 7, 1939. It was before the reissue patent was granted on June 13, 1939.

It is not claimed that petitioners, or their manufacturer (Finkelstein) had any notice of the *ex parte* filing of the application for reissue.

Finkelstein, the manufacturer of the accused device for petitioners, made the accused device after being advised of non-infringement (R. 100).

The complaint alleges (R. 3) that respondent acquired title to the Visitacion reissue, on May 25, 1939. This was after application for reissue had been filed on January 7, 1939, and shortly prior to the grant of the reissue on June 13, 1939.

Respondent went on the market, with its Wallace & Leisy device, in August, 1938 (R. 24), and it continuously sold said Wallace & Leisy device on a large scale, after the original Visitacion patent had issued on October 11, 1938, and before respondent secured any rights from Visitacion. Hence, if petitioners have appropriated the alleged invention of Visitacion, as broadened by the enlarged claims of the reissue, respondent also adversely appropriated said enlarged rights, continuously from August, 1938 to May 25, 1939. The public secured intervening rights, based upon respondent's own unlicensed manufacture and sale, during the period between the grant of Visitacion's original patent on October 11, 1938 and the filing of the reissue on January 7, 1939, even if the period of intervening rights be limited to the period between the grant of the original patent and the *ex parte* filing of the application for reissue.

As another instance of intervening rights, Defendant's Exhibit B (R. 219) is an advertisement dated November 30,

1936, of the "Solo" curler, in the "Meriden Daily Journal" (R. 53). This "Solo" curler was actually sold in November, 1936, and it was sold on a big scale after 1936 (R. 65).

Visitacion and the "Glemby" petitioner executed an exclusive license agreement on May 17, 1937 (R. 202-207) shortly before Visitacion filed his original application on May 25, 1937. Under this agreement, "Glemby" secured the sole and exclusive license to make, use, and sell, the Visitacion curler (R. 203). However, "Glemby" never made anything under its license. This license agreement was cancelled, and Visitacion and Glemby exchanged mutual general releases, on November 18, 1938 (R. 208-209) shortly after Visitacion's original patent was issued on October 11, 1938, and prior to the filing of the reissue on January 7, 1939. During the period between the grant of Visitacion's patent on October 11, 1938 and the cancellation of the Glemby license on November 18, 1938, respondent's Wallace and Leisy curler was unlicensed by Visitacion.

The license agreement of May 17, 1937 shows that Visitacion then conceded that his alleged invention was limited to a spring. On page 202 of the record, it is stated in this license agreement:

"Whereas, the party Visitacion has invented certain new and useful improvements in Hair Curlers which may be briefly described as comprising a hollow cylindrical mandrel composed of two members of unequal length which are partially separated by longitudinal slots adapted to receive the ends of a lock of hair, with a spring disposed in said mandrel \* \* \*"

Page 202 of the record refers to one Blumenfeld, who was then acting as Visitacion's business agent. Visitacion admitted that Blumenfeld had read this license agreement



to him (Visitacion) on May 17, 1937, and that he (Visitacion) had understood that the license agreement described his invention, "as a mandrel with a spring in the mandrel" (R. pp. 143 and 144).

Under the arrangement between Visitacion and the "Glemby" petitioner, Messrs. Mueller & Ruhl, who were patent counsel for "Glemby", filed the original Visitacion application on May 25, 1937, under a power of attorney which Visitacion executed.

Mr. Warren E. Willis, in practice since 1898, had been Visitacion's patent attorney for seventeen years (R. 102). Prior to the grant of the "Glemby" license on May 17, 1937, Willis had prepared several drawings for three patent applications on curlers, to be filed in the name of Visitacion. These three applications had not been filed (R. 102). Every drawing prepared by Willis for Visitacion was limited to a spring, after Visitacion had made all his modifications and changes (R. 119).

These three unfiled patent applications, but no models, were turned over by Willis to Mueller & Ruhl, who filed a substantial duplicate of the description and drawings which Willis had prepared (R. 115). Mueller & Ruhl filed even broader claims than Willis had prepared (R. 223 and 224). Mueller & Ruhl kept Willis and Blumenfeld (Visitacion's business agent) fully informed of all proceedings in Visitacion's original application, and they invited the comments of Mr. Willis (R. 187, 188).

Mr. Mueller, of Mueller & Ruhl, testified that neither Visitacion or Willis or Blumenfeld ever asked for the filing of a claim which was not limited to a spring. If such instructions for broad claims had been given, Mueller would have obeyed them, and taken appeals. Mueller used his best efforts (R. 189). This was conceded by respondent's counsel (R. 181).

While Mueller & Ruhl were prosecuting the original Visitacion application, Visitacion was constantly consulting Willis (R. 115).

Immediately after Visitacion's original patent was issued on October 11, 1938, Visitacion showed his original patent to Willis. Willis never told Visitacion that the original claims were not adequate (R. 118).

Willis subsequently filed the reissue application on January 7, 1939, to get broader claims, because he knew that every original claim was limited to a spring (R. 118).

During the period between October 11, 1938, and January 7, 1939, respondent wanted patent coverage on its commercial Wallace & Leisy device, which it had been selling since August 1938, because the Wallace and Leisy patent did not issue until April 25, 1939. Respondent authorized Willis to spend the money on the reissue (R. 119). Respondent had been advised by its own patent counsel, Barbelew, that additional and broader claims could be secured by reissue (R. 34). Willis never gave such advice.

In shocking disregard of the facts, Willis prepared, and Visitacion verified without reading, a false reissue oath, the pertinent part of which is as follows:

"the following is a true specification of the errors which it is claimed constitute such inadvertence relied upon, and also constitutes a true specification of the manner in which the errors relied upon arose, to wit, that deponent is unversed in the matter of patent interpretation and particularly in the matter of interpretation of claims of patents; that deponent submitted his said invention to patent attorneys who represented at the same time certain people who were interested in deponent's invention but with which attorneys deponent was unfamiliar; that deponent had no reason to believe that his said invention was not being covered as broadly as might be, and that deponent did not discover such deficiency until a

short time after his said patent issued and he was advised by his own and regularly used patent attorney, and with whose methods and explanations deponent is familiar, that his patent was insufficient and defective in that it did not contain claims commensurate with his real invention, such as the claims hereinabove specified; and that immediately upon receiving such information deponent has proceeded to this reissue application."

This reissue oath did *not* allege that Visitacion had instructed Mueller to file a claim which was not limited to a spring, or that Mueller had disobeyed any of Visitacion's instructions. This was an afterthought.

Visitacion signed his application for reissue, including his reissue oath, without reading it (R. 141).

On September 16, 1936, about eight months prior to Visitacion's original filing date of May 27, 1937, Freeman filed application for U. S. Patent No. 2,278,541 (R. 221). Figs. 6 and 7 of this Freeman patent show a long tube 25, which receives one shank of a hairpin, and a short pivoted clamping arm 26.

The appellate opinion (R. 251) states that Freeman's Patent No. 2,278,541 is "for an exact replica of plaintiff's device" and that it was necessary for Visitacion to prove a "reduction to use", prior to Freeman's filing date of September 16, 1936.

As to such "reduction to use", Visitacion produced no corroboration. Visitacion merely stated that he had tried one of his models, made *without* a spring, and not shown in his patent, and "It worked" (R. 125).

Visitacion did not even testify that his springless model worked *satisfactorily*. The disclosure of this springless model was omitted from the three applications which Willis prepared, and which he delivered to Mueller & Ruhl.

As above noted, the appellate opinion characterized Freeman's device shown in No. 2,278,541, filed September 16, 1936 (R. 221), as being an exact replica of plaintiff's device, even though Freeman's device has a *pivoted* clamping arm. If so, the "Solo" device, which was advertised and sold as early as November, 1936, and which was thereafter sold on a large scale, is also a replica of plaintiff's device, and is another clear instance of public intervening rights.

Visitacion is an experienced inventor. He has filed many patent applications (R. 133) and secured at least ten patents (R. 138).

The Findings of Fact (R. 233-238) fail to support respondent in important particulars. Said Findings do not state that Visitacion instructed Mueller to file original claims which were not limited to a spring; or that Freeman knew of Visitacion or derived anything from Visitacion; or that Visitacion ever exhibited his springless models to anybody, save to his employees or agents; or that Glemby or Mueller & Ruhl treated Visitacion unfairly in any manner.

On page 255, the appellate opinion states that the District Court found that Visitacion had instructed Mueller to file claims which were not limited to a spring. This is so stated in the opinion of the District Court (R. 230), where it is erroneously stated that Visitacion's testimony was not contradicted. It was contradicted by Mueller (R. 189). However, the observations in the opinion of the District Court are not findings (*Mayo v. Lakeland Highlands Canning Co.*, 309 U. S. 310, 316).

"We are not here concerned with the written opinions of the trial court, as the statements therein may not be used to ascertain the evidence or the facts, or to control or modify the findings of fact on which

the judgment is based" (*American Ins. Co. v. Scheufler*, 129 F. (2d) 143, 146, 8th Circ.).

On page 252, the appellate opinion states that Visitacion showed his models in 1936, to Solomon. This was denied (R. 70). Glemby's witness testified that Visitacion did not show his models, until about 30 days prior to the license agreement of May 17, 1937 (R. 179).

On these points, the District Court did not find in favor of respondent, when the Findings were made on Nov. 10, 1942 (R. 239), subsequent to the filing of the opinion on October 5, 1942 (R. 232).

The Patent Office first acted on Visitacion's original application on September 18, 1937. It cited 10 prior patents, including Freeman's Patent No. 2,039,789 (R. 220) which was filed on October 19, 1935 and issued on May 5, 1936. Visitacion made no attempt, under Rule No. 75 of the Patent Office (copy annexed) to claim any priority, earlier than Visitacion's filing date of May 25, 1937.

Visitacion filed several claims in his original application, which were finally rejected and cancelled. One of these claims, No. 6, was as follows:

"A hair curling appliance comprising a unitary tubular mandrel slotted longitudinally to present two spaced members relatively long and short, means associated with said members to resiliently clamp a lock of hair entered therebetween, and means on said mandrel to temporarily retain a hair pin in position to receive the curl produced by winding the hair upon the mandrel."

Hence the Patent Office even refused a claim which broadly stated clamping means between the two arms of the curler.

The appellate judgment (R. 258) was filed August 4, 1943.

The jurisdiction to grant this writ is based on Title 28, Sec. 347, U. S. C. A.

### **Reasons for Allowance of Writ.**

The issues upon which this writ is requested, are the validity and infringement of the Visitacion reissue patent.

This case raises important questions, upon which the opinions herein are in direct conflict with opinions of this Court and of other Circuit Courts of Appeal.

1. In order to establish personal intervening rights, was it necessary for petitioners to go on the market, prior to the application of the *ex parte* filing for reissue on January 7, 1939; or was it sufficient for petitioners to go on the market in March, 1939, prior to the grant of the reissue on June 13, 1939, after they had been correctly advised that they did not infringe upon the original patent?

The grant of a reissue may be delayed for several years, especially if the reissue application is involved in an interference. The trade has no notice of the *ex parte* filing of the application.

Under the judgment herein, a manufacturer can never rely upon the limited claims of an original patent. It is not alleged that petitioners had notice of the filing of the reissue.

2. Must intervening rights be based upon personal estoppel, or can any member of the public rely upon intervening use by another member of the public?

Before petitioners' manufacturer put out the accused article, he saw respondent's commercial Wallace & Leisy device (R. 99) and he was correctly advised that it was not covered by any patent (R. 100). Respondent itself created intervening rights according to the most limited application

of this doctrine, by selling its commercial article between the date of the original Visitacion patent and the date of filing of the reissue application. Could respondent cut off the intervening public right, by acquiring the reissue application on May 25, 1939?

3. Can the reissue cut off the rights of Freeman, based upon his filing on September 16, 1936 (R. 221) for a replica of the accused article? Is it necessary for an intervening inventor to go on the market, during the period between the grant of the original patent and the filing of the reissue?

4. Is the reissue oath sufficient to support the enlarged claims?

5. Can Visitacion enlarge his claims to include a springless device, when no such device is disclosed in his original patent?

6. After Visitacion had failed to offer to antedate his original filing date of May 25, 1937 when his original application was pending (*supra*, p. 9), could he thereafter offer such testimony?

7. Could Visitacion antedate his original filing date of May 25, 1937, without corroborating testimony to prove that his springless models, admittedly crude models (R. 173), operated satisfactorily?

#### **POINT 1 (*Supra*, p. 10).**

*Keller v. Adams-Campbell Co.*, 264 U. S. 314.

This Court held that there was a difference of opinion between various Circuit Courts of Appeal, on the doctrine of intervening rights (p. 318), and that this was

“an important issue of general patent law” (p. 319).

On page 317, in discussing *Topliff v. Topliff*, 145 U. S. 156, it was stated:

“that case also recognizes that one who, pending the application and granting of the reissue, manufactures and sells articles which infringe the reissued patent, may be protected on principles of estoppel from the literal application of section 4916, R. S. which makes the operation of the reissue relate to the date of the original patent.”

The doctrine of intervening rights was therefore not limited to adverse use, during the period between the grant of the original patent and the filing of the application for reissue. Adverse use and intervening rights are created by sale at any time prior to the grant of the reissue.

The doctrine that the estoppel must be personal, and that the intervening user must know of the limited claims of the original patent and rely on such limitation, was rendered obsolete in,

*Sontag Chain Stores Co., Ltd. v. National Nut Co. of California*, 310 U. S. 281,

in which the period of delay in filing the reissue application was less than two years. In the instant case, petitioners did rely on such original limitation.

It was stated on page 293 of 310 U. S.:

“Recapture within two years of what a patentee to the public is permissible under specified conditions, but not, we think, ‘at the expense of innocent parties’ ”.

The law should be, if it is not, that he who goes on the market prior to the *grant* of the enlarged reissue patent, without knowledge of the application for reissue, is immune from suit on the enlarged claims.



In *Moto Meter Gauge & Equipment Corp. v. E. A. Laboratories, Inc.*, 55 Fed. (2d) 936, the hostile use had commenced *before* the original patent had issued. It was held that such hostile use created intervening rights, although the period of delay in filing the application for reissue was less than two years.

## POINT 2 (*Supra*, p. 10).

As stated in *Sontag Chain Stores Co. Ltd. v. National Nut Co. of California*, 310 U. S. 281, the acceptance of a limited claim is a dedication of the unclaimed matter, generally to the public.

It was therefore held that the petitioner-defendant had acquired intervening rights, even though it had not known of the original patent.

Under the decisions herein, one or more manufacturers can wipe out the public's intervening rights, by buying the reissue, even though such manufacturers had established a hostile use, prior to the filing of the reissue.

The principle that a single hostile intervening use, is for the benefit of all, is stated in the cases cited at the bottom of page 256 of the record.

In *Milloy Electric Co. v. Thompson-Houston Electric Co.*, 148 Fed. 843, 847, 6th Circ., it was stated that the rule of intervening rights

“does not rest upon the ground of an estoppel in favor of particular persons”,

citing

*White v. Dunbar*, 119 U. S. 47, 52.

## POINT 3 (*Supra*, p. 11).

The entire law of reissue was radically revised in,

*Sontag Chain Stores Co. Ltd. v. National Nut Co. of California*, 310 U. S. 281.

On page 294, it was held that a reissue with enlarged claims was not valid as against "alert inventors".

"Otherwise, the door is open for gross injustice to alert inventors and baffling uncertainty will hinder orderly development of useful arts" (310 U. S., p. 294).

In cutting off Freeman's intervening rights, based on his U. S. Patent No. 2,278,541, filed September 16, 1936 (R. 221), the appellate opinion (R. 257) relies upon *American Automoneer Co. v. Porter*, 232 F. 456. This ignores the fact that Claim 3 of said Freeman patent reads directly upon the accused device. However, it appears from said decision (232 F. p. 463) that the Court relied upon the doctrine, now obsolete, that the intervening inventors did not personally know of the original limited claims. Furthermore, the Court stated that the devices of these intervening inventors did not infringe upon the enlarged claims (232 Fed. p. 463).

"Their structures do not disclose any infringement of the reissue in this respect \* \* \*".

#### POINT 4 (*Supra*, p. 11).

An oath similar to the oath herein (*supra*, p. 6), was held insufficient in,

*General Radio Co. v. Allen B. Dumont Laboratories, Inc.*, 129 Fed. (2d) 608, 3rd Circuit,

in which it was held (p. 611):

"But an error of judgment, even though made by the solicitor and not by the patentee himself, is binding upon the patentee and may not be rectified by a reissue patent."

**POINT 5 (*Supra*, p. 11).**

*U. S. Industrial Chemicals v. Carbide and Carbon Chemicals Corporation*, 315 U. S. 668, page 676:

“It must appear from the face of the instrument that what is covered by the reissue was intended to have been covered and secured by the original.”

The original Visitacion patent does not disclose a springless device.

The reference to a device made of “one single piece of material” (original Visitacion patent, R. 199, p. 1, 1st column, line 20), refers to Fig. 8, in which the spring 46 is an integral bent tongue of the arm 37 (p. 2 of original Visitacion patent, 1st column, lines 30-32). This was claimed in original Claim No. 7.

A reissue cannot be based on the vague general statements which are relied upon in the appellate opinion. In *McDowell v. Ideal Concrete Mach. Co.*, 187 Fed. 814, 7th Circuit, the full description of the original patent is printed on pages 815-817. This description (p. 815) included general statements, similar to those relied on herein. Such general statements were held insufficient. The disclosure of the reissue must be clear and specific in the original.

**POINT 6 (*Supra*, p. 11).**

It has been held that where a patentee fails to file an oath under Rule #75, while his application is pending in the Patent Office, such patentee forever abandons any claim to priority. (*Melber v. School Dist.*, 243 Fed. 1, 6, C. C. A. 3rd; *Duffie v. Brooklyn Edison Co.*, 46 Fed. (2nd), pp. 657-658.)

**POINT 7 (*Supra*, p. 11).**

From the beginning of the patent law, it has always been held that priority could not be based on drawings and models, save as evidencing conception. In order to establish prior invention, it is also necessary to establish prior "reduction to practice" by means of corroborating witnesses who witness an actual satisfactory test. (*Oliver Machinery Co. v. Gellman*, 104 Fed. (2d) 11, C. C. A. 6th; *Collins v. Olsen*, 102 Fed. (2d) 828, 831, C. C. P. A.; *Kear v. Roder*, 115 Fed. (2d) 810, pp. 814, 817, C. C. P. A.; *Crane v. Carlson*, 125 Fed. (2d) 709, C. C. P. A.)

Some of the older cases which illustrate the reason for this rule are:

*Petrie v. De Schweinitz*, 19 App. D. C. 386;

*Garrels v. Freeman*, 21 App. D. C. 212;

*Malcom v. Richards*, 47 App. D. C. 582.

In the latest Deller Edition of Walker on Patents, it is stated in Section 53, page 281:

"Novelty of a machine or manufacture is not negated by any prior unpublished drawings, no matter how completely they may exhibit the patented invention (citing cases), nor by any prior model, no matter how fully it may coincide with the thing covered by the patent."

In Section 107, page 390, it is stated:

"An invention is not reduced to practice by the mere making of sketches, drawings, models, or a verbal description. \* \* \* It is not enough for one to show that after conceiving an idea, he made drawings or models, and experiments with his models."

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of

this Honorable Court directed to the United States Circuit Court of Appeals for the Second Judicial Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgments of said United States Circuit Court of Appeals and of the District Court be reversed; and that your petitioner shall have such other and further relief in the premises as to this Honorable Court may seem meet and just.

ASHER BLUM,  
*Counsel for Petitioner.*









